No. 89-1348

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JOHNATHAN CLAYTON, a minor, by CONNIE CLAYTON, his next friend; Steve Blakley, a minor by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley, Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Petitioners,

vs.

RICHARD M. PLACE; Glen Garett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; all in their individual and official capacities and Purdy R-2 School District,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

Respondents and their *amici* argue that this Court should deny review of this Establishment Clause case for two reasons: (1) they claim that this Court lacks jurisdiction because the named plaintiff-schoolchildren have graduated from Purdy High School; and (2) they assert that, under a revisionist interpretation of the Establishment Clause, the Eighth Circuit panel decision should stand. Neither argument supports a decision to deny *certiorari*.

1. Petitioners Have Standing in their Capacities: (1) as Parents with Children Still in the Purdy School System; (2) as Citizens and Taxpayers Who Are Directly Impacted by a Local School System Which Advances Certain Religious Beliefs; and (3) as Recipients of Nominal Damage Awards.

The short answer[1] to respondents' Objection to Jurisdiction is that several of the plaintiff-parents have children who are still in the Purdy School System and who are still affected by the "no dancing" policy of the Purdy School Board. By way of example, petitioners Joan and Howard Fox have children ages 6, 8, 12 and 14 in the Purdy School System, thus giving the Fox family standing into the next century.[2] Transcript at 158; *see School District*

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[1] As this Court noted in *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520, 548 n.15 (1988), it is unnecessary to consider whether all plaintiffs have standing where some of them clearly have standing.

[2] As respondents are aware, the Welch and Wolf families also have children who are still in the Purdy School System.

(Continued on following page)

of Abington Township v. Schempp, 374 U.S. 203, 224 (1963).[3] To deny review at the present juncture would simply invite relitigation of this case in the names of other children, with the net result bringing this case back to this Court's doorstep three years hence.

In light of the powerful symbolic impact of the "no dancing" rule on the entire Purdy community, plaintiffs also have standing as citizens and taxpayers in the Purdy School District. As Judge Lay noted in his dissent from the denial of rehearing, the "no-dancing" rule is "no less obvious than a monument anchored to the schoolhouse lawn pronouncing: 'THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES.' " A-36, 37. In this sense, the instant case is indistinguishable from other cases where citizens and taxpayers had standing to challenge governmental endorsements of religion even in the absence of any expenditure of public funds. *E.g., County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (citizens challenged religious symbols erected on government property at private expense); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (plaintiffs had "taxpayer standing" to challenge use of public property as a chapel); *ACLU v.*

(Continued from previous page)

Deposition of Frances M. Wolf, at 4; Deposition of Walter R. Welch, at 6.

[3] Respondents' reliance on *Doremus v. Board of Education*, 342 U.S. 429 (1952), is ill-founded because that decision rested on the fact that neither the parent nor student alleged any on-going actual injury. Here, respondents' interference with the efforts of the plaintiff-parents to place their children in a public school environment free of sectarian religious dogma constitutes an on-going injury to them and their children as well. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

Rabun County Chamber of Commerce, 698 F.2d 1098, 1108-09 (11th Cir. 1983) (plaintiffs had "citizen standing" to challenge erection of a cross on public property).[4]

Finally, plaintiffs continue to have standing by virtue of the trial court's award of "legal damages" in the nominal sum of $1.00 per plaintiff. In a number of recent cases, nominal damages have been awarded for a civil rights violation, without any accompanying subject matter jurisdiction problem. *E.g.*, *Coleman v. Turner*, 838 F.2d 1004 (8th Cir. 1988); *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir. 1985); *see generally Carey v. Piphus*, 435 U.S. 247 (1978) (nominal damages provide an important method of vindicating violations of constitutional rights). Here, the nominal damage awards for the past violation of plaintiffs' constitutional rights plainly avoids any claim of mootness. 13A C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3533.3, at 265-66 & nn. 9-10 (1984) (disapproving cases cited in footnote 3 of respondents' Opposition Brief). For all the above reasons, respondents' Objection to Jurisdiction must be overruled.

2. The Revisionist Interpretation of the Establishment Clause Advanced in Respondents' Opposition Brief Underscores the Critical Importance of this Case.

The simple fact remains that there is no credible purpose underlying the Purdy School Board's

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[4] These cases, involving endorsements of religion by local governmental bodies, plainly contrast with cases such as *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), which involved generalized attacks against certain federal governmental practices.

maintenance and enforcement of the "no dancing" rule *other than the advancement of the religious belief that social dancing is a sin*. This religious belief has no counterpart in secular morality; instead, it is a distinctive, idiosyncratic tenet of certain fundamentalist churches, including those in the Purdy community. It also is beyond dispute that the "no dancing" rule stands as a powerful official endorsement of that fundamentalist religious creed. Under these circumstances, respondents' contention that the rule "merely coincides" with certain religious beliefs must be rejected.

Nevertheless, in an effort to advance their revisionist interpretation of the Establishment Clause, respondents have offered a number of material misstatements in their opposition brief. For example, respondents' claim that "[r]eligion was not discussed" by the Purdy School board, Opposition Brief at 8, is plainly inaccurate. The trial court expressly credited the testimony relating out-of-court admissions by school board members regarding the religious basis of the rule and found that the board members' in-court denials of a religious purpose were incredible:

> The board members were not particularly credible, either in demeanor or in the substance of their testimony . . . This Court is skeptical that it heard the complete story concerning the board members' deliberations of the rule and the religious significance of the opposition to dancing in Purdy. A-11, 12.

Simply put, Establishment Clause scrutiny cannot be circumvented by presenting false testimony at trial. *See Edwards v. Aguillard*, 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 1261 (1987).

Similarly, respondents distort the record when they refer to the purported secular justifications for the opposition to dancing. *See* Opposition Brief, at 7-8. Significantly, respondents' selective quotation from the Ministerial Alliance position statement omits the thinly veiled religious references contained in its conclusion:

> [B]eing motivated by an Eternal and Parental Love for the Student Body of this School we submit this report and humbly request that you do not authorize School sponsored Dancing in Purdy Schools.

Moreover, the trial court expressly found that the school board members were fully aware of the pretextual nature of the purported secular bases for the opposition to dancing:

> [The] board's courtroom statements that they accepted the minister's statements at face value defy reality. A-12.

As this Court consistently has held, the assertion of self-serving statements of secular purpose cannot foreclose the appropriate inquiry into the actual purpose of the challenged governmental action. *See Edwards v. Aguillard* 482 U.S. 578, 96 L. Ed. 2d 510, 520-21 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

The record in this case and the trial court's factual findings leave no doubt that the conscious purpose and pre-eminent effect of the Purdy School Board's actions were the promotion of fundamentalist religious beliefs as official school policy. As in *Epperson v. Arkansas*, 393 U.S. 97, 107-08 (1968), the absence of any legitimate policy considerations, "other than the religious views of some

citizens," compels the conclusion that "fundamentalist sectarian conviction is and was the law's reason for existence." Accordingly, this case falls squarely in line with the bedrock principle that the Establishment Clause "means at the very least that government may not demonstrate a preference for a particular religious sect or creed." *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472, 502 (1989).

In the final analysis, respondents' opposition to the petition for *certiorari* is a request that the members of this Court blind themselves to reality and turn their backs on the members of minority faiths in the Purdy community. Fortunately, this Court has never retreated from the principle that the type of official religious discrimination practiced by the Purdy School Board "has no place in the jurisprudence of the Establishment Clause." *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472, 502 (1989). To vindicate the rights of the minority students and parents in the Purdy community, and to reaffirm the fundamental promise of governmental neutrality concerning religious matters embodied in the Establishment Clause, petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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